



Kansas Attorney General Derek Schmidt

A GUIDE TO OPEN MEETINGS (KOMA) AND OPEN RECORDS (KORA)

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Kansas Open Meetings Act

K.S.A. 75-4317 *et seq.*



History of open meetings

- K.S.A. 19-218 – Every board of county commissioners “shall sit with open doors, and all persons conducting in an orderly manner may attend their meetings. . . .”
- First adopted in 1868; last amended in 1923
- KOMA enacted in 1972; provides rules that allow the public to observe nearly 4,000 units of government in Kansas make decisions



Policy and construction

- Meetings shall be open to the public because “a representative government is dependent upon an informed electorate. . . .”
- Law enacted for the “public benefit,” so construed broadly in favor of the public to give effect to its specific purpose of openness
Murray v. Palmgren, 231 Kan. 524 Syl. ¶4 (1982)
- KOMA interpreted liberally and exceptions applied narrowly to carry out purpose



Who is subject to KOMA?

- All legislative and administrative bodies and agencies of the state and political and taxing subdivisions thereof, and other subordinate groups thereof receiving or expending and supported in whole or in part by public funds
- “Subordinate groups” – not defined; if created by a covered entity or the group has become an extension of a covered entity, most likely covered



Who is not subject to KOMA?

- An otherwise covered entity when exercising a “quasi-judicial” function
- Hearings conducted under the Kansas Administrative Procedures Act (KAPA)
- Judiciary
- Private organizations
- Staff meetings of a covered entity



What is a meeting?

- A gathering or assembly in person, through the use of a telephone, or any other medium for interactive communication
- By a majority of the membership of an agency or body subject to this act
- For the purpose of discussing the business or affairs of the body or agency

K.S.A. 2013 Supp. 75-4317a



“Serial communications”

Interactive communications outside of a noticed meeting that:

- Collectively involve a majority of the membership of the body,
- Share a common topic of discussion, and
- Are intended by any or all participants to reach an agreement on a matter that requires binding action to be taken by the body or agency.

K.S.A. 2013 Supp. 75-4318(f)



Notice

- Contrary to popular belief, KOMA does not require notice of meetings to be published in a paper or on a website
- Individual must request notice of meetings
- No formalities to requesting notice – can be verbal or written
- Provide date/time/location where body will meet to requester a “reasonable time” before meeting
- Request valid for one fiscal year
- Must notify of expiration before terminating notice
- Presiding officer has duty to provide notice, but duty may be delegated



Meeting conduct

- KOMA does not address meeting procedures
- Agenda – not required to create, but if one exists, make it available to everyone
- Agenda does not have to be mailed out in advance of meeting
- Public may record meeting as long as not disruptive
- No public right to speak, but only to listen and observe
- No secret ballots
- Minutes – only required for executive sessions, but bylaws, ordinances, policies, etc., may require minutes to be kept



Executive sessions

- Permits discussion of certain matters outside of public view
- An open meeting must be convened first
- No binding actions may be taken in an executive session, but a consensus is allowed
- If a consensus is achieved, an open and formal vote must be taken in open session



Executive sessions

- Must be a formal motion, seconded and carried; motion recorded in the minutes
- Parts of the motion for executive session:
 - ✓ Justification for closure (brief description of the topic to be discussed)
 - ✓ Subject matter (from the statute)
 - ✓ Time and place open meeting will resume

See K.S.A. 2013 Supp. 75-4319(a)



Executive sessions

Subject matter allowed:

Personnel matters of non-elected personnel

- To protect the privacy interests of the employee
- Non-elected employees only, not contractors or appointments to boards or commissions
- May discuss applicants for employment



Executive sessions

Subject matter allowed:

Consultation with your attorney

- The attorney must be present
- The communication must be privileged
- No third parties may be present (breaks privilege)



Executive sessions

Subject matter allowed:

Employee-Employer negotiations

- For the purpose of formal negotiations – not general employee meetings or discussions
- School boards have special rules



Executive sessions

Subject matter allowed:

Confidential data relating to the financial affairs or trade secrets of corporations, partnerships, trusts, and individual proprietorship

- Called the economic development exception, but make sure that the data being reviewed is confidential or a trade secret



Executive sessions

Subject matter allowed:

Matters affecting a student, patient or resident of a public institution.

- With this subject, any hearing must be open if requested by the person involved



Executive sessions

Subject matter allowed:

Preliminary discussions relating to the acquisition of real property

- Acquisition only – not sale
- Remember – no binding action in executive sessions



Executive sessions

Subject matter allowed:

Security Measures

- Open discussion would jeopardize security measures that protect infrastructure and the public; includes intelligence information, tactical plans, resource deployment and vulnerability assessments



Enforcement

- KOMA is a civil statute – not criminal
- Any person, county/district attorney or the attorney general may bring an action in district court
- County/district attorney and attorney general have subpoena power
- Enforcement actions “shall take precedence over all other cases and shall be assigned for hearing and trial at the earliest practicable date”



Remedies for violations

- Voiding action taken (attorney general or county/district attorney only)
- Injunction (stopping action)
- Mandamus (forcing action)
- Declaratory judgment



Penalties for violations

- Fines up to \$500 per person for each violation
- Can be grounds for ouster from office
- Potential grounds for recall from office
- Court may award court costs to person seeking enforcement of KOMA; award assessed against public body
- Court may award court costs to defendant if plaintiff maintained action frivolously, not in good faith or without reasonable basis in law or fact

K.S.A. 75-4320



Kansas Open Records Act

K.S.A. 45-215 *et seq.*



Policy, construction & purpose

- “Public records shall be open for inspection by any person unless otherwise provided, and this act shall be liberally construed and applied to promote such policy” – K.S.A. 45-216(a)
- Current version of KORA enacted in 1984; replaced version first enacted in 1957
- KORA provides the procedure for the public to view and make copies of governmental records
- KORA also defines and categorizes records



What is a “public agency”?

- Includes the state or any political or taxing subdivision of the state, or any office, officer, agency or instrumentality thereof, or any other entity receiving or expending or supported in whole or in part by public funds appropriated by the state or political/taxing subdivision
- “Instrumentality” – not defined in KORA; if created by a covered entity or the group has become an extension of a covered entity, most likely covered



What is not a “public agency”?

- Private companies, even if they receive public funds in exchange for goods and services
- Judges and courts
- An individual legislator or member of a governing body
- Private individuals



Applying KORA to a request

- KORA is, in part, a procedural statute
- Best illustrated by reviewing the sequence of actions that should take place



KORA requirements for public agencies

- Appoint a freedom of information (FOI) officer to assist with KORA requests
- Display, distribute or otherwise make available a brochure describing requester rights, agency responsibilities and procedures for inspecting or obtaining copies of public records
- Include the name/title of records custodian, fees and office hours available for anyone to make a request

K.S.A. 45-226 and 45-227



Who may make a request?

- Any person may make a request
- The person need not be a resident
 - *But see* *McBurney v. Young*, US Sup. Ct., April 2013 (not a violation of the privileges and immunities clause to limit access to public records to citizens of Commonwealth of Virginia)
- The person need not provide a reason for their request



Form of the request

The public agency may require:

- The request to be in writing
- Only the requester's name and address
- Proof of identification
- Written certification that the requester will not use names and addresses obtained to solicit sales or services



Rights of the requester

- Unless closed by law, the public has the right to review all public records
- Anyone may make an abstract or request copies of a record
- If copies cannot be made where the record is located, arrangements must be made to allow copying
- If portions of a record are closed, the remainder must be made available to the requester



Limitations on requester's rights

- Requester may not remove a public record without the written consent of the custodian
- Public agency not required to make copies of radio or recording tapes or discs, video tapes or films, pictures, slides, graphics, illustrations unless shown at a public meeting
- Copyrighted materials may not be reproduced without the permission from the copyright holder, but must be available for viewing or listening.



Responding to the request

- The request must be "acted upon" as soon as possible, but not later than the end of the 3rd business day following date request is received
- The three acceptable responses:
 1. The record is provided (in the form requested, if possible)
 2. The request is under review and the records, if permitted, will follow
 3. The request is denied with a detailed explanation for the denial



Allowable fees and charges

- Agencies may only recover their actual costs to provide the requested records
- These costs include staff time to retrieve, review and redact information from a record
- Fees may be estimated and collected before the records are provided



"Public record" defined

- "Any recorded information, regardless of form or characteristics, which is made, maintained or kept by or is in the possession of any public agency. . . ."
- This includes written records and photographs, computer data and email



What is not a "public record"?

- Private records owned by a private person or entity and not related to functions, activities, programs or operations funded by public funds
- Records that do not exist at the time of the request
- Records that must be created in order to fulfill a request



Categorizing records

- Preliminary presumption is that records are open without restriction
- Requested public records must be released unless an exemption to disclosure exists
- Exemptions to disclosure – discretionary or mandatory closure
- Burden rests on the public agency to prove the requested records are exempt from disclosure
- Redaction – if record contains material not subject to disclosure, public agency "shall separate or delete such material" and make the record available



Policy reasons records may be closed

- Personal privacy
- Safety / security
- Internal communications while policies are developed or administrative procedures are underway



Discretionary closure – personal privacy

- Medical, psychiatric, psychological or alcoholism/drug dependency treatment records pertaining to identifiable patients
- Personnel records, performance ratings or individually identifiable records pertaining to employees or applicants; **except** may not close:
 - Names/positions of employees
 - Salaries or actual employment contracts, including employment related contracts or agreements
 - Length of service
- Clearly unwarranted invasion of personal privacy



Discretionary closure – personal privacy

- Records that would disclose the name, home address, email address, phone/cell number, or other contact information for concealed carry licensees, applicants or persons enrolled in or who completed weapons training – K.S.A. 2013 Supp. 45-221(a)(53)
- Records "shall not be disclosed unless otherwise required by law"
- Records relating to persons issued licenses, applicants or persons denied a license confidential and cannot be disclosed pursuant to KORA; disclosure a class A misdemeanor – K.S.A. 2013 Supp. 75-7c06(b)
- Records of person whose license suspended or revoked subject to public inspection under KORA



Discretionary closure – safety/security

- Criminal investigation records – K.S.A. 2013 Supp. 45-221(a)(10)
 - Protects innocent persons whose names might be involved in an investigation as suspects or informants
 - Protects integrity of an on-going case and investigative techniques
 - Built in standard of review
- Records concerning emergency or security information or procedures
- Records that would reveal the location of a safe house or shelter for abused persons or the name, address, location or other contact information of alleged victims of stalking, domestic violence or sexual assault



Discretionary closure – safety/security

- Records of a public agency on a public website which are searchable by a keyword search and that identify the home address or home ownership of a LEO or parole, probation, court services or community correctional services officers
- Individual officer shall file a request to restrict identifying information from public access on the public website with the custodian of records; must be restricted within 10 business days of receipt of request; restriction expires after 5 years; officer may file new request for restriction at any time



Discretionary closure – safety/security

- Records of a public agency on a public website which are searchable by a keyword search and that identify the home address or home ownership of a federal judge, supreme court justice, court of appeals judge, district court or magistrate judge, US attorney for Kansas, assistant US Attorney, AG, assistant AG, county/district attorney or assistant CA/DA
- Individual shall file a request to restrict identifying information from public access on the public website with the custodian of records; must be restricted within 10 business days of receipt of request; restriction expires after 5 years; individual may file new request for restriction at any time



Discretionary closure – internal communications or procedures

- Records privileged under the rules of evidence, unless holder of privilege consents to disclosure
- Records of an investigation conducted under civil litigation or administrative adjudication, if disclosure interferes with the procedure
- Correspondence between a public agency and a private individual, unless intended to give notice of an agency action, policy or determination
- Notes, preliminary drafts, research data in the process of analysis, unfunded grant proposals, memoranda, recommendations or other records in which opinions are expressed or policies or actions are proposed **except** if any of the above are identified or cited at a public meeting or listed on the agenda



Discretionary closure – internal communications or procedures

- Attorney work product
- Appraisals/engineering/feasibility estimates/evaluations by or for a public agency relating to acquisition of property, prior to the award of formal contracts
- Specifications for competitive bidding, until officially approved by the public agency
- Sealed bids and related documents until a bid is accepted or all bids rejected



Records that are mandatorily closed

- There are nearly 300 types of records that are required to be closed by statute and not listed in KORA
- KORA will look to other statutes first
- Records custodian must be familiar with those records and what must be separated into the open and closed portions of a record



2014 Legislative Changes

Search and arrest warrants

- Before 2014 change** – closed to the general public
- Affidavits and sworn testimony given to obtain warrant were closed without a written court order, except as to the defendant or defendant's counsel – K.S.A. 22-2302(2) (arrests); K.S.A. 22-2502(c) (searches)
- Unexecuted arrest and search warrants – K.S.A. 2013 Supp. 21-5906 (disclosure is a class B non-person misdemeanor)
- LEO can disclose arrest or search warrant: (1) to gain assistance in executing warrant; (2) to encourage the person named in the warrant to voluntarily surrender; or (3) where warrant is issued in a case involving the abduction of a child unless such disclosure is specifically prohibited by court issuing the warrant



2014 Legislative Changes

Arrest and search warrants laws amended

- S. Sub. for HB 2389** – changed law on access to affidavits or sworn testimony in support of probable cause requirements for arrest or search warrants:
 - Executed **prior to July 1, 2014** – not open without a written court order, but available to defendant or defendant's counsel "for such disposition as either may desire"
 - Executed **on or after July 1, 2014** – open to the public **after** warrant executed
- Does not amend KORA**



2014 Legislative Changes

Accessing warrants executed on or after July 1, 2014

- Must file request with *Clerk of the Court*
- Clerk must "promptly notify" defendant or defendant's counsel, the prosecutor, and the magistrate that such request was filed
- Within 5 business days after receiving notice from clerk, defendant or counsel and prosecutor may submit to magistrate under seal (a) any proposed redactions and reasons supporting redactions; or (b) a motion to seal the affidavits or sworn testimony
- Within 5 business days after receiving proposed redactions or a motion to seal, or within 10 business days after receiving notice of a request for disclosure, whichever is earlier, magistrate shall:
 - Order disclosure of affidavit(s) / sworn testimony with appropriate redactions, if any, or
 - Order affidavit(s) / sworn testimony sealed and not subject to public disclosure



2014 Legislative Changes

Grounds for magistrate to redact or seal affidavit(s) or sworn testimony

- Jeopardize safety / well being of victim, witness, confidential source or undercover agent or cause destruction of evidence
- Reveal info from wiretap or unexpired warrant to tracking device
- Interfere with any prospective LE action, criminal investigation or prosecution
- Reveal identity of any confidential source or undercover agent
- Reveal confidential investigative techniques or procedures not known to general public
- Endanger life / physical safety of any person
- Reveal identifying information of victim of any sexual offense
- Reveal name of minor
- Reveal DOB, phone numbers, DL#, ID#, SSN, EIN, taxpayer ID # VIN or financial account info



Enforcement

- KORA is a civil statute – not criminal
- Any person, county/district attorney, or the attorney general may bring an action in the district court where the records are located
- County/district attorney and attorney general have subpoena power
- Such actions "shall be assigned for hearing and trial at the earliest practicable date" – K.S.A. 45-222(e)



Penalties for violations

- Fines up to \$500 per violation against public agency for knowing violation or intentional failure to furnish information; action must be brought by county/district attorney or attorney general
 - Costs/reasonable attorney's fees if agency's denial not in good faith and without reasonable basis in fact/law; includes appeals
 - Costs/reasonable attorney's fees to agency if requester's action not in good faith and without reasonable basis in fact/law; includes appeals
- K.S.A. 45-222 and 45-223



KOMA / KORA

Thank you!

Additional resources:

<http://ag.ks.gov/>

<http://ag.ks.gov/legal-services/open-govt>

<http://ksag.washburnlaw.edu/>

(Attorney General Opinions)